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Supreme Court of the United States

October Term, 1961

No. [redacted]

JOHN THOMAS AVENT, CALLIS NAPOLIS BROWN, SHIRLEY MAE BROWN, FRANK McGILL COLEMAN, JOAN HARRIS NELSON, DONOVAN PHILLIPS, and LACY CARROLE STREETER,

Petitioners,

—v.—

STATE OF NORTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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JOHN THOMAS AVENT, CALLIS NAPOLIS BROWN, SHIRLEY MAE BROWN, FRANK McGILL COLEMAN, JOAN HARRIS NELSON, DONOVAN PHILLIPS, and LACY CARROLE STREETER,

Petitioners,

—v.—

STATE OF NORTH CAROLINA,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in the above-entitled cause on January 20, 1961.

Citations to Opinions Below

The opinion of the Supreme Court of North Carolina is reported at 118 S. E. 2d 47 and is set forth in the appendix attached hereto, *infra*, p. 1a.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered January 20, 1961 (Clerk's certificate attached hereto, *infra*, App., p. 22a).[1] On April 4, 1961, time for

[1] The Clerk's certificate recites that final judgment was entered on January 20, 1961. The record, however, contains no actual form

filing a petition for writ of certiorari was extended by the Chief Justice to and including May 4, 1961. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below and claiming here, denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Whether the due process and equal protection clauses of the Fourteenth Amendment suffer the state to use its executive and judiciary to enforce racial discrimination in a business that has for profit opened its property to the general public while using the state criminal trespass statute to enforce racial discrimination within the same property.

2. Whether, where the criminal statute applied to convict petitioners gave no fair and effective warning that their actions were prohibited, and their conduct violated no standard required by the plain language of the law, the conviction offends the due process clause of the Fourteenth Amendment.

3. Whether the decision below conflicts with decisions of this Court securing the Fourteenth Amendment right to liberty of expression.

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of judgment. Upon inquiry to the Clerk, he informed counsel for petitioners that the judgment is a paper prepared by the Clerk. Because stay of execution was obtained before he prepared this paper, he did not actually complete it and place it in the record.

Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves North Carolina General Statutes, §14-134:

> Trespass on land after being forbidden. "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars or imprisoned not more than thirty days."

Statement

This is one of 2 cases filed here today (the other is *State* v. *Fox*, No. 442, Supreme Court of North Carolina, Fall Term, 1960 reported at 118 S. E. 2d 58) involving whether a state may use its criminal trespass statute to enforce racial segregation according to the customs of the community in one portion of a commercial establishment otherwise open to the public without segregation. The issues are similar to those presented by *Garner*, *Briscoe* and *Hoston* v. *State of Louisiana*, Nos. 617, 618 and 619, respectively, certiorari granted March 20, 1961, in which a state employed a statute forbidding disturbing the peace for this purpose.

May 6, 1960, petitioners, five Negro students from North Carolina College, Durham, North Carolina (R. 35, 40, 44-45, 48, 49) and two white students from Duke University, Durham (R. 42, 47) were customers of Kress's Department Store, Durham. The store, in a five story building (R. 20)

has approximately fifty counters (including a "stand-up" lunch counter) which serve Negroes and whites without racial distinction (R. 22). No sign at the store's entrance barred or conditioned Negro patronage (R. 22). Petitioners made various purchases (R. 36, 40, 43, 47, 48, 49), as some of them had in the past as regular customers (R. 36, 41, 43, 45, 48), and in time went to the basement lunch counter. Here a sign stated "Invited Guests and Employees Only" (R. 21, 23). No writing further elucidated this sign's meaning, but the manager testified that although no invitations as such were sent out, white persons automatically were considered guests; Negroes and whites accompanied by Negroes were not (R. 22-23). The counter was bordered by an iron railing (R. 21) and petitioners entered through the normal passageway (R. 38).

Some of the petitioners had requested and had been denied service on previous occasions at this counter (R. 38). However, they "continued to try" and at this time again "went there for service" (R. 38). They expected to be served at the basement lunch counter because they had been served upstairs (R. 50). They had not been arrested previously for trespassing and were not arrested for trespassing upon entering the store through its main doors. Nor did they expect to be arrested for trespassing on this occasion (R. 38, 44, 50).

Petitioners were participants in an informal student organization which opposed racial segregation (R. 40), and felt they had a right to service at Kress's basement lunch counter after having been customers in other departments (R. 40, 42, 50; and see, R. 46 (objection to question sustained)). Some had picketed the store to protest its policy of welcoming Negroes' business while refusing them lunch counter service (R. 37, 42, 50).

The manager again declined to serve them. He stated that if Negroes wanted service they might obtain it at the back of the store (R. 24), or at a stand-up counter upstairs (R. 22), and asked them to leave (R. 21).

"It is the policy of our store to wait on customers dependent upon the custom of the community" (R. 22), he testified. "It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs 'Invited Guests and Employees Only'" (R. 23).

When petitioners remained seated awaiting service, the manager called the police to enforce his demand (R. 21). An officer promptly arrived and asked petitioners to leave (R. 21). Upon refusal the officer arrested them for trespassing (R. 21, 4). Petitioners were indicted in the Superior Court of Durham County, the indictments stating that each petitioner

> "with force and arms, ... did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store . . . said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that . . . [petitioner] had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the state." (R. 2, 3, 4, 5, 6, 7, 8.)

Each indictment identified each petitioner as "CM" (colored male) (R. 3, 4, 7, 8), "WM" (white male) (R. 5), "CF" (colored female) (R. 6), or "WF" (white female) (R. 9). Defendants made motions to quash the indictment (see *infra*, pp. 6-7), which raised defenses under the Fourteenth Amendment to the United States Constitution. These were denied (R. 10-12).

Petitioners were tried June 30 and July 1, 1960 (R. 20). They pleaded not guilty (R. 15) and were found guilty (R. 15). Various federal constitutional defenses (see *infra*, pp. 7-9), were made throughout and at the close of the trial, but were overruled. Petitioners Coleman, Phillips and Callis Napolis Brown were sentenced to thirty days imprisonment in the common jail of Durham County to work under the supervision of the State Prison Department (R. 16, 17, 18). Petitioner Streeter was sentenced similarly to twenty days (R. 19). Petitioner Avent was sentenced to fifteen days in the Durham County jail (R. 15). Prayer for judgment was continued in the cases of petitioners Shirley Mae Brown and Joan Harris Nelson (R. 16-17).

Error was assigned, again raising and preserving federal constitutional defenses (see, *infra*, pp. 9-11), and the case was heard by the Supreme Court of North Carolina which affirmed on January 20, 1961 (Clerk's certificate following court's opinion).

How the Federal Questions Were Raised and Decided

Prior to trial petitioners filed motions to quash the indictment.

The Negro petitioners alleged that G. S. 14-134 was unconstitutionally applied to them in that while using facili-

ties of S. H. Kress and Company, which was licensed by the City and County of Durham to carry on business open to the general public, they were charged with trespass on account of race and color contrary to the equal protection and due process clauses of the Fourteenth Amendment; that G. S. 14-134 denied due process of law secured by the Fourteenth Amendment in that it was unconstitutionally vague; that G. S. 14-134 was unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment because the arrest was made to aid S. H. Kress and Company, which was open to the public, in enforcing its whims and caprices against serving members of the Negro race on the same basis as members of other races, all of whom had been invited to use said establishment; that the defendants who were on the premises of S. H. Kress and Company pursuant to an invitation to the general public, were denied the use of said establishment solely because of race and color, and were arrested for attempting to exercise the right of invitees to equal treatment, contrary to the due process and equal protection clauses of the Fourteenth Amendment (R. 10-12).

The white petitioners made identical allegations except that instead of stating that they were denied constitutional rights because of race, they charged that they were indicted because of association with the Negro petitioners (R. 12-14).

The motions to quash were denied and exception was taken thereto (R. 12, 14)

Following the State's evidence the Negro petitioners made Motions for Dismissal as of Nonsuit (R. 26-35). These alleged that petitioners entered S. H. Kress's store to shop and use its facilities; that they had purchased other articles in the store; had been trading there for a long time prior to arrest; had entered the store in orderly fash-

ion; and were arrested when they took seats and requested service at the lunch counter. The motions prayed for nonsuit pursuant to the Fourteenth Amendment in that enforcement of G. S. 14-134 in these circumstances was state action forbidden by the equal protection and due process clauses of the Fourteenth Amendment; that defendants were denied rights secured by the Civil Rights Act of 1866 which assures to all citizens the same right in every state and county as is enjoyed by white citizens to purchase personal property; that S. H. Kress and Company was operating under a license of the City of Durham and, therefore, petitioners' arrest at the owner's behest violated the rights secured by the Fourteenth Amendment to the Constitution of the United States; that G. S. 14-134 denied due process of law secured by the Fourteenth Amendment in that it was vague; that G. S. 14-134 denied due process of law and the equal protection of the laws in that it was applied to carry out the whims and caprices of the proprietor against members of the Negro race; and that petitioners were denied rights secured by the due process and equal protection clauses of the Fourteenth Amendment by being arrested for attempting to exercise rights to equal treatment as invitees of S. H. Kress and Company. These motions were denied and exception was taken thereto (R. 30).

Similar motions filed on behalf of the white petitioners alleged that they had been denied these rights because of association with Negroes (R. 30-33). These motions were denied and exception was taken thereto (R. 33).

Additional Motions for Dismissal as of Nonsuit alleged that S. H. Kress was performing an economic function invested with the public interest; that petitioners were peacefully upon the premises; that there was no basis for the charge other than an effort to exclude petitioners from

the store solely because of race; that petitioners were at the same time excluded from equal service at the preponderant number of other eating establishments in the City of Durham, and that the charge recited by the indictment denied to petitioners due process of law and the equal protection of the laws secured by the Fourteenth Amendment.

The motion also alleged that petitioners were at all times upon an area essentially public; at no time were they defiant or in breach of the peace; that they were peacefully exercising rights of assembly and speech to protest racial segregation; that the prosecution was procured for the purpose of preventing petitioners from speaking and otherwise peacefully protesting the refusal of the preponderant number of stores open to the public in the City of Durham to permit Negroes to enjoy certain facilities and that the arrests were in aid of this policy all contrary to the due process and equal protection clauses of the Fourteenth Amendment.

These motions were denied and exceptions were taken thereto (R. 34-35).

Following the close of petitioners' case they renewed their written motions to quash the indictments and for dismissal as of nonsuit. This motion was denied and exception was taken thereto (R. 51).

Assignments of Error were filed against the action of the Court in overruling the Motion to Quash (Assignments 1 and 2, R. 70), in overruling the motion for judgment as of nonsuit (Assignments 4, 5, 6 and 7, R. 71), and to the action of the Court in overruling defendants' motions to quash the indictments and for dismissal as of nonsuit made at the close of all the evidence (Assignment 10, R. 71).

The Supreme Court of North Carolina disposed adversely of these constitutional claims. It concluded its opinion by stating:

> "All of the assignments of error by the defendants have been considered, and all are overruled. Defendants have not shown the violation of any of their rights, or of the rights of any one of them, as guaranteed by the 14th Amendment to the Federal Constitution, and by Article I, §17, of the North Carolina Constitution." (App. p. 21a.)

In explication it held that:

> "In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law." (App. p. 7a.)

Moreover, the opinion held that:

> "'The right of property is a fundamental, natural, inherent, and inalienable right. It is not ex gratia from the legislature, but ex debito from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included

the right to acquire, hold, enjoy, possess, use, manage, . . . property.' 11 Am. Jur., Constitutional Law, §335." (App. p. 11a.)

To the argument that the action taken below constitutes state action contrary to the due process and equal protection clauses of the Fourteenth Amendment, the Court held:

> "Defendants misconceive the purpose of the judicial process here. It is to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, *even though it enforces the clear legal right of racial discrimination of the owner.*" (Emphasis supplied.) (App. p. 12a.)

Moreover, no freedom of speech and assembly were denied, the Court held:

> "No one questions the exercise of these rights by the defendants, if exercised at a proper place and hour. However, it is not an absolute right." (App. p. 16a.)

Reasons for Granting the Writ

This case involves substantial questions affecting important constitutional rights, resolved by the court below in conflict with principles expressed by this Court.

I.

The State of North Carolina has enforced racial discrimination contrary to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

Petitioners seek certiorari to the Supreme Court of North Carolina, having unsuccessfully contended below that their conviction constitutes state enforcement of racial discrimination contrary to the equal protection and due process clauses of the Fourteenth Amendment. In rejecting petitioners' claim, the court below held that ". . . the purpose of the judicial process" was "'. . . to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, even though it enforces the clear legal right of racial discrimination of the owner" (App. p. 12a). Answering the claim that this was state action prohibited by the Fourteenth Amendment, the court below replied that the right of property is "fundamental, natural, inherent and inalienable," being "not ex gratia from the legislature, but ex debito from the Constitution" (App. p. 11a); that the right could be characterized as "sacred"; and that the North Carolina trespass laws were "color blind," their sole purpose being to protect property from trespassers (*Id.*). The Court held that the police and judicial action in arresting and convicting petitioners "cannot fairly be said to be state action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution" (App. p. 13a).

But from the officer's orders to depart to the final judgment of the highest state court, this has been the state's cause. Judicial acts of state courts are "state action" un-

der the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1.[2] Equally clear, the Amendment reaches conduct of the police. Cf. *Monroe* v. *Pape*, —— U. S. ——, 5 L. ed. 2d 492 (1961); *Screws* v. *United States*, 325 U. S. 91. See also *Baldwin* v. *Morgan*, —— F. 2d —— (5th Cir. No. 18280, decided Feb. 17, 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533, note 1 (5th Cir. 1960); *Valle* v. *Stengel*, 176 F. 2d 697 (3rd Cir. 1949), all of which condemn police enforcement of racial segregation in public places.

State action which enforces racial discrimination and segregation is condemned by the Fourteenth Amendment's equal protection clause. *Buchanan* v. *Warley*, 245 U. S. 60; *Brown* v. *Board of Education*, 347 U. S. 483; *Shelley* v. *Kraemer*, *supra*; *Gayle* v. *Browder*, 352 U. S. 903. Moreover, state inflicted racial discriminations, bearing no rational relation to a permissible governmental purpose, offend the concept of due process. *Bolling* v. *Sharpe*, 347 U. S. 497; *Cooper* v. *Aaron*, 358 U. S. 1.

For the state to infect the administration of its criminal laws by using them to support lunch counter segregation,

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[2] The subject of judicial action as "state action" is treated exhaustively in Part II of Chief Justice Vinson's opinion which concludes:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." (*Id.* at 18.)

In addition to the many cases cited in *Shelley*, *supra*, at 14-18, see also: *Barrows* v. *Jackson*, 346 U. S. 249; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463.

as an aspect of the "customs" of a segregated society, offends the salutary principle that criminal justice must be administered "without reference to consideration based upon race." *Gibson* v. *Mississippi*, 162 U. S. 565, 591.

Indeed, when the Supreme Court of North Carolina held that the state judicial process "enforces the clear, legal right of racial discrimination of the owner" (App. p. 12a), it "construed this legislative enactment as authorizing discriminatory classification based exclusively on color." Cf. Mr. Justice Stewart, concurring in *Burton* v. *Wilmington Parking Authority*, 29 U. S. Law Wk. 4317, 4320. And, as Mr. Justice Frankfurter wrote, dissenting in the *Burton* case, "for a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment." (*Ibid.*)

The Fourteenth Amendment from the beginning has reached and prohibited all racial discrimination save that "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings," and that which is "not sanctioned in some way by the State," *Civil Rights Cases*, 109 U. S. 3, 17. "State action of every kind . . . which denies . . . the equal protection of the laws" is prohibited by the Amendment. *Id.* at 11; cf. *Burton* v. *Wilmington Parking Authority*, *supra*. The Fourteenth Amendment was "primarily designed" to protect Negroes against racial discrimination. *Strauder* v. *West Virginia*, 100 U. S. 303, 307. "The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from . . . legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy. . . ." (*Ibid.*)

The fact that a property interest is involved does not imply a contrary result. It is the state's power to enforce such interests that is in issue. For, as the Court said in *Shelley* v. *Kraemer*, 334 U. S. 1, 22:

> ". . . It would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 326 U. S. 501."

Indeed, as the Court said in *Marsh* v. *Alabama*, 326 U. S. 501, 505-506:

> "We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

Here, certainly, is the case of "an owner, [who] for his advantage, opens up his property for use by the public in general."

Petitioners contend that the states may not, under the Fourteenth Amendment, use their police[3] and judiciary

[3] The arresting officer took full responsibility for the arrest:

> "After Mr. Boger asked these defendants to leave, in my presence, and they refused to leave, that constituted trespassing. He did not sign the warrants after the arrest. I did not have a warrant with me when we made the arrest. Mr. Boger did not sign the warrant before we arrested them" (R. 25).

to enforce racial discrimination for a business open to the general public. Analyzing the totality of circumstances, with regard for the nature of the property interests asserted, and the state's participation in their creation and enforcement no property interest of such an enterprise warrants departing from the Fourteenth Amendment's clear stricture against racial discrimination. As this Court said recently in *Burton* v. *Wilmington Parking Authority*, 29 U. S. Law Week 4317, 4318 (April 17, 1961):

> "Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is 'an impossible task' which 'this Court has never attempted.' *Kotch* v. *Pilot Comm'rs*, 330 U. S. 552, 556. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

What is the "property right" involved here? S. H. Kress and Company did business in a commercial building opened to the public as a whole for the business advantage of the owner. There was no practice of selecting customers or limiting the classes of persons who may enter. The store was not, as some may be, limited to men, women, adults, white persons or Negroes. Negroes were accommodated throughout the building except the basement lunch counter (R. 22). No claim or interest in privacy was exercised by the owner in the customary use of this building.

The specific area in dispute, the lunch counter, was an integral part of this single commercial establishment, and like the entire premises was open to the public to do business for profit. It was not severed for the owner's private use; nor was it like a stockroom, employees' working area, or a living space connected to a store.

There is no issue concerning protection of property from use alien to its normal intended function. Petitioners sought only to purchase food. Whatever their motives (a frankly acknowledged desire to seek an end to racial discrimination), their actions conformed to those of ordinary purchasers of food. Petitioners were not disorderly or offensive. The manager's sole objection was that some of them were Negroes and the others accompanied Negroes. The sole basis of exclusion, ejection, arrest and conviction was race. The "crime" was being Negroes, or being with Negroes, at a "white only" lunch counter.

Moreover, the manager testified that the lunch counter was segregated "in the interest of public safety" (R. 22), and that company policy throughout the country was "dependent upon the customs of the community" (R. 22). Obviously then, the asserted right here is related to participation in, or conformity with, a community custom of segregation, the maintenance of a segregated society.

Therefore, the asserted "property" right was simply the right to discriminate solely on the basis of race, and according to the customs of the community, in one integral part of a single commercial building open to the general public against persons otherwise welcome in all other parts of the premises. This, indeed, may be called a "property right" but as thus revealed, it is far from the "sacred, natural, inherent and inalienable" property right (App. p. 11a) which the generalized language of the court below

held to be at stake. For as Mr. Justice Holmes wrote, dissenting in *Lochner* v. *New York*, 198 U. S. 45, 76, "[g]eneral propositions do not decide concrete cases."

The arbitrary quality of the "property right" supported by the state's trespass law here is emphasized by the fact that the Kress Company required segregation only for customers who sit to eat; those standing to eat in the same store were served without any racial discrimination (R. 22). Cf. *Burton* v. *Wilmington Parking Authority, supra*, terming exclusion of a Negro as offensive in a restaurant and his acceptance in other parts of the same building "irony amounting to grave injustice." 29 U. S. L. Week 4317.

This "property interest" hardly need be protected in order for our form of constitutional government to survive (see App. pp. 13a, 15a). Obviously, for example, this type of "property interest" may be taken away by the states without denying due process of law.[4] Indeed, mere reference to the common law duty of common carriers and innkeepers demonstrates that an owner's use of his property affects the nature of his dominion over it. Cf. *Civil Rights Cases*, 109 U. S. 3, 25. This Court has said on several occasions, "that dominion over property springing from ownership is not absolute and unqualified." *Buchanan* v. *Warley*, 245 U. S. 60, 74; *United States* v. *Willow River Power Co.*, 324 U. S. 499, 510; *Marsh* v. *Alabama*, 326 U. S. 501, 506; *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 417 (Justice Brandeis's dissenting opinion). See *Munn* v. *Illinois*, 94 U. S. 113; 5 Powell on Real Property 493 *et seq.* (1956).

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[4] See for example, *Western Turf Asso.* v. *Greenberg*, 204 U. S. 359; cf. *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100.

This case does not involve a claim that the state must affirmatively provide a legal remedy against "private" racial discrimination. (Cf. *Burton* v. *Wilmington Parking Authority*, 29 U. S. Law Week 4317, April 17, 1961). Rather, petitioners assert only their immunity from criminal prosecution. Nor is there involved judicial enforcement of racial discrimination by trespass laws to protect an owner's interest in maintaining privacy in the use of his property, such as a home or private club. Countervailing considerations that may be involved when a state acts to protect its citizens' interest in their privacy, are not present. There is no issue as to whether state trespass laws may be used to enforce an exclusion for no reason. Finally, there is no claim that the Fourteenth Amendment bars enforcement of trespass laws generally.

Consequently, the case involves only this highly important issue: Whether the state may use its executive and judicial machinery (particularly its criminal laws) to enforce racial discrimination for a business company that by its own choice and for its own advantage has opened its commercial property to the public. Petitioners submit that prior decisions of this Court demonstrate this question should be answered No.

This case merits plenary review in this Court because of the substantial public importance of the questions relating to the extent to which a state may use its criminal laws to enforce racial segregation. As indicated to the Court in petitions for certiorari filed and granted in *Garner, Briscoe*, and *Hoston* v. *State of Louisiana*, Nos. 617, 618 and 619, October Term 1960, this problem is one which has arisen in many different communities and many state courts since the spring of 1960. See, Pollitt, "Dime Store Demon-

strations: Events and Legal Problems of the First Sixty Days," 1960 Duke Law Journal 315. Review of this case will facilitate the proper disposition of many similar criminal prosecutions.

II.

The criminal statute applied to convict petitioners gave no fair and effective warning that their actions were prohibited; petitioners' conduct violated no standard required by the plain language of the law; thereby their conviction offends the due process clause of the Fourteenth Amendment and conflicts with principles announced by this Court.

Petitioners were convicted under North Carolina General Statute, §14-134, which provides:

> If any person after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days.

Although the statute in terms prohibits only going on the land of another *after* being forbidden to do so, the Supreme Court of North Carolina has now construed the statute to prohibit also remaining on property when directed to leave following lawful entry. (See Opinion below, App. p. 12a). Stated another way, the statute now is applied as if "remain" were substituted for "enter." Expansive judicial interpretation of the statute began by a statement in *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295 (1958) (a case in which defendants deliberately ig-

nored racial signs posted outside an ice cream parlor and also refused to leave upon demand),[5] 92 years after enactment of the law.[6]

The instant case is the first unambiguous holding under §14-134 which convicts defendants who went upon property with permission and merely refused to leave when directed.

Without a doubt petitioners and all Negroes were welcome within the store—apart from the basement lunch counter. The arresting officer stated that "The only crime committed in my presence, as I saw, it was their failure and refusal to leave when they were ordered to do so by the Manager" (R. 26). There were no discriminatory signs outside the store (R. 23). No sign forbade Negroes and white persons who accompany Negroes to sit at the lunch counter; the sign said merely "Employees and Invited Guests Only" (R. 21). Whatever petitioners' knowledge of the store's racial policy as it had been practiced, there was no suggestion that they had ever been forbidden to go to the lunch counter and request service. The Court's conclusory statement that defendants "entered" (trespassed) "after having been forbidden to do so" (App. 19a), was simply a holding that defendants' acts in failing to leave when directed violated the statute.

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[5] In the *Clyburn* opinion, and here, the State court explained construction of §14-134 by reference to analogous construction of a statute prohibiting forcible entry and detainer (N. C. Gen. Stat. §14-126), which had been construed to apply to peaceful entry followed by forcible opposition to a later demand to leave. The Court held that "entry" was synonymous with "trespass" in both statutes (14-126 and 14-234). (14-134 does not use the word "entry"; it states "go or enter upon".)

The facts of the *Clyburn* case are summarized in the opinion below in this case (App. pp. 8a-9a).

[6] The Statute was first enacted in 1866. North Carolina Laws, Special Session, Jan., 1866, C. 60.

Absent the special expansive interpretation given §14-134 by the North Carolina Supreme Court the case would plainly fall within the principle of *Thompson* v. *City of Louisville*, 362 U. S. 199, and would be a denial of due process of law as a conviction resting upon no evidence of guilt. There was obviously no evidence that petitioners entered the premises "after having been forbidden to do so," and the conclusion that they did rests solely upon the special construction of the law.

Under familiar principles the construction given a state's statute by its highest court determines its meaning. However, petitioners submit that this statute has been so judicially expanded that it does not give a fair and effective warning of the acts it now prohibits. Rather, by expansive interpretation the statute now reaches more than its words fairly and effectively define, and as applied it therefore offends the principle that criminal laws must give fair and effective notice of the acts they prohibit.

The due process clause of the Fourteenth Amendment requires that criminal statutes be sufficiently explicit to inform those who are subject to them what conduct on their part will render them criminally liable. "All are entitled to be informed as to what the State commands or forbids", *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, and cases cited therein in note 2.

Construing and applying federal statutes this Court has long adhered to the principle expressed in *Pierce* v. *United States*, 314 U. S. 306, 311:

> . . . judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. Lanzetta v. New Jersey, 306 U. S. 451, and cases cited.

In *Pierce, supra,* the Court held a statute forbidding false personation of an officer or employee of the United States inapplicable to one who had impersonated an officer of the T. V. A. Similarly in *United States* v. *Cardiff*, 344 U. S. 174, this Court held too vague for judicial enforcement a criminal provision of the Federal Food, Drug, and Cosmetic Act which made criminal a refusal to permit entry or inspection of business premises "as authorized by" another provision which, in turn, authorized certain officers to enter and inspect "after first making request and obtaining permission of the owner." The Court said in *Cardiff*, at 344 U. S. 174, 176-177:

> The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. United States v. L. Cohen Grocery Co., 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. Herndon v. Lowry, 301 U. S. 242.

The Court applied similar principles in *McBoyle* v. *United States*, 283 U. S. 25, 27; *United States* v. *Weitzel*, 246 U. S. 533, 543, and *United States* v. *Wiltberger*, 18 U. S. (5 Wheat.) 76, 96. Through these cases runs a uniform application of the rule expressed by Chief Justice Marshall:

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, be-

cause it is of equal atrocity, or of kindred character, with those which are enumerated (Id. 18 U. S. (5 Wheat.) at 96.)

The cases discussed above involved federal statutes concerning which this Court applied a rule of construction closely akin to the constitutionally required rule of fair and effective notice. This close relationship is indicated by the references to cases decided on constitutional grounds. The *Pierce* opinion cited for comparison *Lanzetta* v. *New Jersey, supra,* and "cases cited therein," while *Cardiff* mentions *United States* v. *L. Cohen Grocery Co., supra,* and *Herndon* v. *Lowry, supra.*

On its face the North Carolina trespass statute warns against a single act, i.e., going or entering upon the land of another "after" being forbidden to do so. "After" connotes a sequence of events which by definition excludes going on or entering property "before" being forbidden. The sense of the statute in normal usage negates its applicability to petitioners' act of going on the premises with permission and later failing to leave when directed.

But by judicial interpretation "enter" was held synonymous with "trespass," and, in effect, also with "remain." Here a legislative *casus omissus* was corrected by the court. But as Mr. Justice Brandeis observed in *United States* v. *Weitzel, supra* at 543, a *casus omissus* while not unusual, and often undiscovered until much time has elapsed, does not justify extension of criminal laws by reference to legislative intent.

Moreover, that the indictments specified both that petitioners had entered after having been forbidden and also that they refused to leave after being ordered to do so, does not correct the unfairness inherent in the statute's

failure specifically to define a refusal to leave as an offense. As this Court said in *Lanzetta* v. *New Jersey*, *supra*:

> It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U. S. 359, 368; Lovell v. Griffin, 303 U. S. 444.

Petitioners do not contend for an unreasonable degree of specificity in legislative drafting. Some state trespass laws have specifically recognized as distinct prohibited acts the act of going upon property after being forbidden and the act of remaining when directed to leave.[7]

Converting by judicial construction the common English word "enter" into a word of art meaning "trespass" or "remain," has transformed the statute from one which fairly warns against one act into a law which fails to apprise those subject to it "in language that the common word will understand, of what the law intends to do if a certain line is passed". (*McBoyle* v. *United States*, 283 U. S. 27). Nor does common law usage of the word "enter"

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[7] See for example the following state statutes which do effectively differentiate between "entry" after being forbidden and "remaining" after being forbidden. The wordings of the statutes vary but all of them effectively distinguish the situation where a person has gone on property after being forbidden to do so, and the situation where a person is already on property and refuses to depart after being directed to do so, and provide separately for both situations: Code of Ala., Title 14, §426; Compiled Laws of Alaska Ann. 1958, Cum. Supp. Vol. III, §65-5-112; Arkansas Code, §71-1803; Gen. Stat. of Conn. (1958 Rev.), §53-103; D. C. Code, §22-3102 (Supp. VII, 1956); Florida Code, §821.01; Rev. Code of Hawaii, §312-1; Illinois Code, §38-565; Indiana Code, §10-4506; Mass. Code Ann. C. 266, §120; Michigan Statutes Ann. 1954, Vol. 25, §28.820(1); Minnesota Statutes Ann. 1947, Vol. 40, §621.57; Mississippi Code §2411; Nevada Code, §207.200; Ohio Code, §2909.21; Oregon Code, §164.460; Code of Virginia, 1960 Replacement Volume, §18.1-173; Wyoming Code, §6-226.

support the proposition that it is synonymous with "trespass" or "remaining." While "enter" in the sense of going on and taking possession of land is familiar (Ballantine, "Law Dictionary", (2d Ed. 1948), 436; "Black's Law Dictionary" (4th Ed. 1951), 625), its use to mean "remaining on land and refusing to leave it when ordered off" is novel.

Judicial construction often has cured criminal statutes of the vice of vagueness, but this has been construction which confines, not expands, statutory language. Compare *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, with *Herndon* v. *Lowry*, 301 U. S. 242.

As construed and applied, the law in question no longer informs one what is forbidden in fair terms, and no longer warns against transgression. This failure offends the standard of fairness expressed by the rule against expansive construction of criminal laws and embodied in the due process clause of the Fourteenth Amendment.

III.

The decision below conflicts with decisions of this Court securing the Fourteenth Amendment right to freedom of expression.

Petitioners were engaged in the exercise of free expression by means of verbal requests to the management and the requests implicit in seating themselves at the counter for nonsegregated lunch counter service. Their expression (asking for service) was entirely appropriate to the time and place in which it occurred. Certainly the invitation to enter an establishment carries with it the right to discuss and even argue with the proprietor concerning terms and conditions of service so long as no disorder or obstruction of business occurs.

Petitioners did not shout, obstruct business, carry picketing signs, give out handbills, or engage in any conduct inappropriate to the time, place and circumstances. And, as is fully elaborated above in Part I of this petition, there was no invasion of privacy involved in this case, since the lunch counter was an integral part of commercial property open up to the public.

This Court and other courts on numerous occasions have held that the right of free speech is not circumscribed by the mere fact that it occurs on private property. The existence of a property interest is but one circumstance to be considered among many. In *Marsh* v. *Alabama, supra,* for example, this Court overturned the trespass conviction of Jehovah's Witnesses who went upon the premises of a company town to proselytize holding that such arrest and conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, the Court upheld the validity of the National Labor Relations Board's ruling that lacking special circumstances that might make such rules necessary, employer regulations forbidding all union solicitation on company property regardless of whether the workers were on their own or company time, constituted unfair labor practices.[8]

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[8] See also *N. L. R. B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir., 1945); *United Steelworkers* v. *N. L. R. B.*, 243 F. 2d 593, 598 (D. C. Cir., 1956) (reversed on other grounds) 357 U. S. 357. ("Our attention has not been called to any case under the Wagner Act or its successor in which it has been held that an employer can prohibit either solicitation or distribution of literature by employees simply because the premises are company property.

Employees are lawfully within the plant, and nonworking time is their own time. If Section 7 activities are to be prohibited, something more than mere ownership and control must be shown.")

Compare *N. L. R. B.* v. *Fansteel Metal Corp.*, 306 U.S. 240, 252 (employees seized plant; discharge held valid: "high-handed proceeding without shadow of legal right").

In *Martin* v. *Struthers*, 319 U. S. 141, this Court held unconstitutional an ordinance which made unlawful ringing doorbells of residence for the purpose of distributing handbills, upon considering the free speech values involved—"[d]oor to door distribution of circulars is essential to the poorly financed causes of little people," at p. 146—and that the ordinance precluded individual private householders from deciding whether they desired to receive the message. But effecting "an adjustment of constitutional rights in the light of the particular living conditions of the time and place", *Breard* v. *Alexandria*, 341 U. S. 622, 626, the Court, assessing a conviction for door-to-door commercial solicitation of magazines, contrary to a "Green River" ordinance, concluded that the community "speak[ing] for the citizens," 341 U. S. 644, might convict for crime in the nature of trespass after balancing the "conveniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results." 341 U. S. at 644. Because, among other things, "[s]ubscription may be made by anyone interested in receiving the magazines without the annoyances of house to house canvassing," *ibid.*, the judgment was affirmed.

Similarly, following an appraisal of the speech and property considerations involved, a Baltimore City Court, *State of Maryland* v. *Williams*, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959), has on Fourteenth Amendment and Labor Management Relations Act grounds, decided that pickets may patrol property within a privately owned shopping center. See also *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277, 279 (1948), which held that picketing within Pennsylvania Station was not trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it";

Freeman v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959), which denied relief to a shopping center owner against picketers on his property, relying on the Fourteenth Amendment.

The liberty secured by the due process clause of the Fourteenth Amendment insofar as it protects free expression is not limited to verbal utterances, though petitioners here expressed themselves by speech. The right comprehends picketing, *Thornhill* v. *Alabama*, 310 U. S. 88; free distribution of handbills, *Martin* v. *Struthers*, 319 U. S. 141; display of motion pictures, *Burstyn* v. *Wilson*, 343 U. S. 495; joining of associations, *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; the display of a flag or symbol, *Stromberg* v. *California*, 283 U. S. 359. What has become known as a "sit in" is a different but obviously well understood symbol, a meaningful method of communication and protest.

In the circumstances of this case, the only apparent state interest being preserved was that of maintaining the management's rights to exclude Negroes from the lunch counter. The management itself sought nothing more. But as Justice Holmes held in *Schenck* v. *United States*, 249 U. S. 47, 52, the question is "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil" that the state has a right to prevent.

The state has no interest in preserving such discrimination and certainly has no valid interest in suppressing speech which is entirely appropriate to the time and place and does not interfere with privacy, when the speech urges an end to racial discrimination imposed in accordance with the customs of the community.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Opinion by Mr. Justice Mallard

SUPREME COURT OF NORTH CAROLINA

Fall Term 1960

No. 654—Durham

STATE

—v.—

JOHN THOMAS AVENT

STATE

—v.—

LACY CARROLE STREETER

STATE

—v.—

FRANK MCGILL COLEMAN

STATE

—v.—

SHIRLEY MAE BROWN

STATE

—v.—

DONOVAN PHILLIPS

STATE

—v.—

CALLIS NAPOLIS BROWN

STATE

—v.—

JOAN HARRIS NELSON

Appeal by defendants from Mallard, *J.*, 30 June 1960 Criminal Term of Durham.

Seven criminal actions, based on seven separate indictments, which were consolidated and tried together.

The indictment in the case of defendant John Thomas Avent is as follows: "The Jurors for the State upon their oath present, That John Thomas Avent, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the county aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Company store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Company, owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Company, to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said John Thomas Avent, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The other six indictments are identical, except that each indictment names a different defendant.

The State's evidence tends to show the following facts:

On 6 May 1960 S. H. Kress and Company was operating a general variety store on Main Street in the city of Durham. Its manager, W. K. Boger, had complete control and authority over this store. The store has two selling floors

and three stockroom floors, and is operated to make a profit. On the first floor the store has a stand-up counter, where it serves food and drinks to Negroes and White people. The luncheonette department serving food is in the rear of the basement on the basement floor. On 6 May 1960 S. H. Kress and Company had iron railings, with chained entrances, separating the luncheonette department from other departments in the store, and had signs posted over that department stating the luncheonette department was operated for employees and invited guests only. Customers on that date in the luncheonette department were invited guests and employees.

On 6 May 1960 these seven defendants, five of whom are Negroes and two of whom (Joan Harris Nelson and Frank McGill Coleman) are members of the White race, were in the store. Before the seven defendants seated themselves in the luncheonette department, and after they seated themselves there, W. K. Boger had a conversation with each one of them. He told them that the luncheonette department was open for employees and invited guests only, and asked them not to take seats there. When they seated themselves there, he asked them to leave. They refused to leave until after they were served. He called an officer of the city police department. The officer asked them to leave. They did not do so, and he arrested them, and charged them with trespassing. The seven defendants were not employees of the store. They had no authority or permission to be in the luncheonette department.

On cross-examination W. K. Boger testified in substance: S. H. Kress and Company has 50 counters in the store, and it accepts patronage of Negroes at those 50 counters. White people are considered guests. Had the two White defendants come into the store on 4 May 1960, I would not have served them in the luncheonette department for the

reason they had made every effort to boycott the store. He would have served the White woman defendant, but he asked her to leave when she gave her food to a Negro. The object of operating our store in Durham is definitely to make a profit. It is the policy of our store to operate all counters dependent upon the customs of the community. It is our policy in Durham to refuse to serve Negroes at the luncheonette department downstairs in our seating arrangement. It is also our policy there to refuse to serve White people in the company of Negroes. We had signs all over the luncheonette department to the effect that it was open for employees and invited guests.

Captain Cannady of the Durham Police Department testified in substance: As a result of a call to the department he went to S. H. Kress and Company's store. He saw on 6 May 1960 all the defendants, except Coleman, seated at the counter in the luncheonette department. He heard W. K. Boger ask each one of them to leave, and all refused. He asked them to leave, and told them they could either leave or be arrested for trespassing. They refused to leave, and he charged them with trespassing. He knew W. K. Boger was manager of the store. He makes an arrest when an offense is committed in his presence, and the defendants were trespassing in his presence.

When the State rested its case, all seven defendants testified. The five Negro defendants testified in substance: All are students at North Carolina College for Negroes in Durham. Prior to 6 May 1960, Negroes, including some of the Negro defendants, had been refused service by S. H. Kress and Company in its luncheonette department. All are members of a student organization, which met on the night of 5 May 1960, and planned to go the following day to Kress' store, make a purchase, and then to go to the luncheonette department, take seats, and request service.

The following day the five Negro defendants did what they planned.

The White woman defendant, Joan Harris Nelson, is a student at Duke University. Prior to 6 May 1960 she had not attended the meetings at the North Carolina College for Negroes for the purpose of securing service at the luncheonette department of the Kress store, though she has attended some of the meetings since then. She had been on the picket lines in front of the store. On 6 May 1960 she went into the Kress store, bought a ball-point pen, went to the luncheonette department, and took a seat. She was served, and while eating she offered to buy some food for Negroes from the North Carolina College, who were sitting on each side of her. When she was served food, no Negroes were in the luncheonette department. Mr. W. K. Boger asked her to leave because she was not invited, and was antagonizing customers. She did not leave, and was arrested.

The White male defendant, Frank McGill Coleman, is a student at Duke University. On 6 May 1960 he went into the Kress store, bought a mother's day card, joined his friend, Bob Markham, a Negro, and they went to the luncheonette department, and seated themselves. He asked for service, and was refused. Mr. W. K. Boger asked them to leave, telling them they were not invited guests, and he refused to do so, and was arrested. Prior to this date he had carried signs in front of the Kress store and other stores discouraging people to trade with them.

Some, if not all, of the defendants had been engaged previously in picketing the Kress store, and in urging a boycott of it, unless their demands for service in the luncheonette department were acceded to.

Jury Verdict: All the defendants, and each one of them, are guilty as charged.

From judgments against each defendant, each defendant appeals.

T. W. Bruton, Attorney General, and Ralph Moody, Assistant Attorney General, *for the State.*

William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, W. G. Pearson, F. B. McKissick and L. C. Berry, Jr., *for Defendants-Appellants.*

Parker, J. Each defendant—five of whom are Negroes and two members of the White race—before pleading to the indictment against him or her made a motion to quash the indictment. The court overruled each motion, and each defendant excepted. The motions were made in apt time. *S.* v. *Perry,* 248 N. C. 334, 103 S. E. 2d 404; *Carter* v *Texas,* 177 U. S. 442, 44 L. Ed. 839; 27 Am. Jur., Indictments and Information, §141.

At the close of all the evidence each defendant made a motion for judgment of compulsory nonsuit. Each motion was overruled, and each defendant excepted.

S. H. Kress and Company is a privately owned corporation, and in the conduct of its store in Durham is acting in a purely private capacity to make a profit for its shareholders. There is nothing in the evidence before us, or in the briefs of counsel to suggest that the store building in which it operates is not privately owned. In its basement in the luncheonette department it operates a restaurant. "While the word 'restaurant' has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating-house and cook-shop, to any other place where eatables are furnished to be consumed on the premises. Citing authority. It has been defined as a place to which a person

resorts for the temporary purpose of obtaining a meal or something to eat." *S.* v. *Shoaf*, 179 N. C. 744, 102 S. E. 705. To the same effect see, 29 Am. Jur., (1960), Innkeepers, §9, p. 12. In *Richards* v. *Washington F. & M. Ins. Co.*, 60 Mich. 420, 27 N. W. 586, the Court said: "A 'restaurant' has no more defined meaning, (than the English word shop), and is used indiscriminately for all places where refreshments can be had, from the mere eating-house or cookshop to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed on the premises is subordinate." Quoted with approval in *Michigan Packing Co.* v. *Messaris*, 257 Mich. 422, 241 N. W. 236, and restated in substance in 43 C. J. S., Innkeepers, §1, subsection b, p. 1132.

No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants, and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. *S.* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295; *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845; *Slack* v. *Atlantic White Tower System, Inc.*, 181 F. Supp. 124, affirmed by the U. S. Court of Appeals for the 4th Circuit 27 December 1960, —— F. 2d ——; *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S. E. 2d 906; *Wilmington Parking Authority* v. *Burton* (Del.), 157 A. 2d 894; *Nance* v. *Mayflower*

Restaurant, 106 Utah 517, 150 P. 2d 773. See 10 Am. Jur., Civil Rights, §21; *Powell* v. *Utz*, 87 F. Supp. 811; and Annotation 9 Am. & Eng. Ann. Cas. 69—statutes securing equal rights in places of public accommodation. We have found no case to the contrary after diligent search, and counsel for defendants have referred us to none.

In *Alpaugh* v. *Wolverton, supra*, the Court said: "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. Citing authority. His rights and responsibilities are more like those of a shopkeeper. Citing authority. He is under no common-law duty to serve every one who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. Citing authority."

In *Boynton* v. *Virginia*, 5 December 1960, —— U. S. ——, —— L. Ed. ——, the Court held that a Negro passenger in transit on a paid Interstate Trailways' journey had a right to food service under the Interstate Commerce Act in a Bus Terminal Restaurant situate in the Bus Station, and operated under a lease by a company not affiliated with the Trailways Bus Company. Then the Court in the majority opinion deliberately stated: "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

In *S.* v. *Clyburn, supra*, the defendants were tried on similar warrants charging that each defendant unlawfully entered upon the land of L. A. Coletta and C. V. Porcelli after being forbidden to do so and did "unlawfully refuse to leave that portion of said premises reserved for members of the White Race knowing or having reason to know that she had no license therefor." Coletta and Porcelli did business under the trade name of Royal Ice Cream

Company retailing ice cream and sandwiches. The building in which they did business is separated by partition into two parts. One part has a door opening on Dowd Street, the other a door opening on Roxboro Street. Each portion is equipped with booths, a counter and stools. Over the Dowd Street door is a large sign marked Colored, over the Roxboro Street door is a similar sign marked White. Sales are made to different races only in the portions of the building as marked. Defendants, all Negroes, went into the building set apart for White patrons, and requested service. Coletta asked them to leave. They refused to do so, and they were arrested by a police officer of the city of Durham. All were convicted, and from judgments imposed, all appealed to the Supreme Court. We found No Error in the trial. The Court in its opinion said: "The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts in this nation. Madden v. Queens County Jockey Club, 72 N. E. 2d 697 (N. Y.); Terrell Wells Swimming Pool v. Rodriguez, 182 S. W. 2d 824 (Tex.); Booker v. Grand Rapids Medical College, 120 N. W. 589 (Mich.); Younger v. Judah, 19 S. W. 1109 (Mo.); Goff v. Savage, 210 P. 374 (Wash.); De La Ysla v. Publix Theatres Corporation, 26 P. 2d 818 (Utah); Brown v. Meyer Sanitary Milk Co., 96 P. 2d 651 (Kan.); Horn v. Illinois Cent. R. Co., 64 N. E. 2d 574 (Ill.); Coleman v. Middlestaff, 305 P. 2d 1020 (Cal.); Fletcher v. Coney Island, 136 N. E. 2d 344 (Ohio); Alpaugh v. Wolverton, 36 S. E. 2d 906 (Va.). The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants."

In an Annotation in 9 A. L. R., p. 379, it is said: "It seems to be well settled that, although the general public

have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so." The Annotation cites cases from eight states supporting the statement. See to the same effect, *Brookside-Pratt Min. Co.* v. *Booth*, 211 Ala. 268, 100 So. 240, 33 A. L. R. 417, and Annotation in 33 A. L. R. 421.

This is said by Holmes, J., for the Court in *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252, 256, 60 L. Ed. 984, 987, a suit to restrain the Public Utilities Commission from exercising jurisdiction over the business of a taxicab company: "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes . . . "

None of the cases cited in defendants' brief are applicable to the situation which obtains in the instant cases. For instance, *Cooper* v. *Aaron*, 358 U. S. 1, 3 L. Ed. 2d 5—public education; *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531—public transportation; *Valle* v. *Stengel*, 176 F. 2d 697—a case in respect to an amusement park in the State of New Jersey, which State has a statute, R. S. 10: 1-3, N. J. S. A., providing that no proprietor of a place of public resort or amusement. ". . . shall directly or indirectly refuse, withhold from, or deny to, any person any of the accommodations, advantages, facilities or privileges thereof . . . on account of race, creed or color," R. S. 10: 1-6, N. J. S. A.

"The right of property is a fundamental, natural, inherent, and inalienable right. It is not *ex gratia* from the legislature, but *ex debito* from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included the right to acquire, hold, enjoy, possess, use, manage, . . . property." 11 Am. Jur., Constitutional Law, §335.

G. S. 14-134 has been the statute law of this State for nearly a hundred years. It reads: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days." Then follows a proviso as to obtaining a license to go upon land of another to look for estrays. This statute is color blind. Its sole purpose is to protect people from trespassers on their lands. It is concerned with only three questions. One, was the land in either the actual or constructive possession of another? Two, did the accused intentionally enter upon the land of another? Three, did the accused so enter upon the land of another after being forbidden to do so by the person in possession? *S. v. Baker*, 231 N. C. 136, 56 S. E. 2d 424.

G. S. 14-126 has been the statute law of this State for many years, and reads: "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor." This statute

is also color blind. "Its purpose is to protect possession only." *S. v. Baker, supra.* We have repeatedly held in applying G. S. 14-126 that a person who remains on the land of another after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful. The word "entry" as used in each of these statutes is synonymous with the word "trespass." *S. v. Clyburn, supra.*

The officer of the city of Durham had a right and duty to arrest all seven defendants in the luncheonette department of the Kress store, because all of them were committing misdemeanors in his presence. G. S. 15-41. There is no merit in their contention that this constituted State action denying them rights guaranteed to them by the 14th Amendment to the Federal Constitution and by Article I, §17, of the State Constitution. *S. v. Clyburn, supra.*

Defendants in essence contend that the indictments should be quashed and the cases nonsuited because the judicial process here constitutes State action to enforce racial segregation in violation of their rights under the due process clause and under the equal protection of the laws clause of the 14th Amendment to the Federal Constitution, and in violation of their rights under Article I, §17, of the State Constitution, and further that G. S. 14-134 and G. S. 14-126 are being unconstitutionally applied for the same purpose. Defendants misconceive the purpose of the judicial process here. It is to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, even though it enforces the clear legal right of racial discrimination of the owner. There is no merit to this contention.

The Court said in *Shelley v. Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 3 A. L. R. 2d 441: "Since the decision of this Court in the Civil Rights Cases, 109 US 3, 27 L ed

835, 3 S Ct 18 (1833), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." This interpretation has not been modified: *Collins* v. *Hardyman*, 341 U. S. 651, 95 L. Ed. 1253; *District of Columbia* v. *Thompson Co.*, 346 U. S. 100, 97 L. Ed. 1480.

Private rights and privileges in a peaceful society living under a constitutional form of government *like ours* are inconceivable without State machinery by which they are enforced. Courts must act when parties apply to them—even refusal to act is a positive declaration of law—, and, hence, there is a fundamental inconsistency in speaking of the rights of an individual who cannot have judicial recognition of his rights. All the State did in these cases was to give or create a neutral legal framework in which S. H. Kress and Company could protect its private property from trespassers upon it in violation of G. S. 14-134 and G. S. 14-126. There is a recognizable difference between State action that protects the plain legal right of a person to prevent trespassers from going upon his land after being forbidden, or remaining upon his land after a demand that they leave, even though it enforces the cleared legal right of racial discrimination of the owner, and State action enforcing covenants restricting the use or occupancy of real property to persons of the Caucasian race. The fact that the State provides a system of courts so that S. H. Kress and Company can enforce its legal rights against trespassers upon its private property in violation of G. S. 14-134 and G. S. 14-126, and the acts of its judicial officers in their official capacities, cannot fairly be said to be State action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution. Such

judicial process violates no rights of the defendants guaranteed to them by Article I, §17, of the State Constitution. To rule as contended by defendants would mean that S. H. Kress and Company could enforce its rights against White trespassers alone, but not against Negro trespassers and White and Negro trespassers in company. Surely, that would not be an impartial administration of the law for it would be a denial to the White race of the equal protection of the law. If a land owner or one in possession of land cannot protect his natural, inherent and constitutional right to have his land free from unlawful invasion by Negro and White trespassers in a case like this by judicial process as here, because it is State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must. Annotation 9 A. L. R., p. 379 quoted above; 4 Am. Jur., Assault and Battery, §76, p. 167; 6 C. J. S., Assault and Battery, §20, (2). This is said in 4 Am. Jur., Assault and Battery, §76, p. 168: "Even though the nature of the business of the owner of property is such as impliedly to invite to his premises persons seeking to do business with him, he may, nevertheless, in most instances refuse to allow a certain person to come on his premises, and if such person does thereafter enter his premises, he is subject to ejection although his conduct on the particular occasion is not wrongful." It is further said in the same work, same article, §78: "The right lawfully to eject trespassers is not limited to the owner or occupier of the premises, but may be exercised by his agent in any case where the principal might exercise the right." The motive of the owner of land in ejecting trespassers from his premises is immaterial so long as he uses no more force than is necessary to accomplish his purpose. 6 C. J. S., Assault and Battery, p. 821. White people also have constitutional rights as well as Negroes, which must be protected, if our constitutional

form of government is not to vanish from the face of the earth.

This is said in an article designated "The Meaning of State Action" by Thomas P. Lewis, Associate Professor of Law, University of Kentucky, and appearing in Columbia Law Review, December 1960, Vol. 60, No. 8, in note 134, page 1122: "State court recognition of the restaurateur's private discrimination could be in the form of denial of any action against him by an aggrieved party. A related issue is the ability of the state to enforce through arrest and an action for trespass the discrimination of the private owner. None of the interpretations of Shelley (*Shelley* v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 1161) of which the writer is aware, except Professor Ming's, *supra* note 92 (Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases, 16 U. Chi. L. Rev. 203 (1949)) would extend it to this kind of case."

In *Slack* v. *Atlantic White Tower System, Inc.*, *supra*, the Court said; "No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency."

In *S.* v. *Cooke*, 248 N. C. 485, 103 S. E. 2d 846, the defendants were convicted and sentenced on a charge that they did "unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises." We found no error. Their appeal was dismissed by a divided court by the United States Supreme Court. *Wolfe* v. *North Carolina*, 364 U. S. 177, 4 L. Ed. 2d 1650. In neither the majority opinion nor in the minority opinion was the question

of State action referred to. It seems that if the United States Supreme Court had thought that th arrest and prosecution was State action, it would have reversed our decision. It seems further that the action of that Court in dismissing the appeal means that a State has the power to enforce through arrest and an action for trespass the discrimination of a private owner of a private business operated on premises privately owned.

There is no merit in defendants' contention that all the cases should be nonsuited, because the demands that they leave Kress' store, their arrest by an officer of the city of Durham, and the judicial process here, is an unconstitutional interference with their constitutional rights of free speech and of assembly to advocate and persuade for a termination of racial discrimination.

No one questions the exercise of these rights by the defendants, if exercised at a proper place and hour. However, it is not an absolute right. The answer to this contention is given by the Court in *Kovacs* v. *Cooper*, 336 U. S. 77, 93 L. Ed. 513, 10 A. L. R. 2d 608: "Of course, even the fundamental rights of the Bill of Rights are not absolute. Th *Saia* Case recognized that in this field by stating 'The hours and place of public discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, *Schenck* v. *United States*, 249 US 47, 52, 63 L ed 470, 473, 39 S Ct 247, that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.' Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in

a place and at a time beyond the protecting hand of the guardians of public order."

The evidence in these cases shows that the White defendants, and most, if not all, of the Negro defendants were freely and without molestation exercising these rights upon the streets of the city of Durham. However, they had no constitutional right to exercise these rights as trespassers in Kress' store in violation of G. S. 14-134 and G. S. 14-126 in Kress' store.

There is no merit in defendants' contention that the indictments should be quashed, and the cases nonsuited, because S. H. Kress and Company is licensed by the city of Durham to operate a retail store, and therefore racial discrimination in the store cannot be enforced. The license is not in the record before us, and there is no suggestion by defendants that the license issued to S. H. Kress and Company contained any restrictions as to whom S. H. Kress and Company should serve. The answer to this contention, showing it is without merit, is set forth in *S. v. Clyburn, supra,* in *Slack v. Atlantic White Tower System, Inc., supra,* and in *Williams v. Howard Johnson's Restaurant, supra,* and defendants' contention is overruled upon authority of those cases. In the last case the Court said: "The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment."

Defendants further contend that the indictments should be quashed, and the cases nonsuited, because G. S. 14-134 is too indefinite and vague to be enforceable under the due process clause of the 14th Amendment and under Article I, §17, of the State Constitution, in that the statute does not require the person in charge of the premises to identify himself, and in that W. K. Boger did not identify himself when he asked them not to enter the luncheonette department, and when he asked them to leave after they seated themselves. This contention is not tenable.

G. S. 14-134 necessarily means that the person forbidding a person to go or enter upon the lands of another shall be the owner or occupier of the premises or his agent, and that is an essential element of the offense to be proved by the State beyond a reasonable doubt. The statute is not too vague and indefinite to be enforceable as challenged by defendants, because it does not use the specific words that the person forbidding the entry shall identify himself. This is a matter of proof.

On a motion for judgment of compulsory nonsuit the State's evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. *S.* v. *Corl*, 250 N. C. 252, 108 S. E. 2d 608. In our opinion, when the State's evidence is so considered, it permits the reasonable inference that all the defendants knew when W. K. Boger forbade them to go upon or enter the luncheonette department, and requested them to leave after they had seated themselves there, he was the agent of S. H. Kress and Company in charge of the store, and we so hold.

Defendants contend that all the cases should be nonsuited because the evidence is insufficient to carry the case to the jury. All defendants introduced evidence. Having done so, they waived their motions for judgment of involuntary nonsuit which they had made at the close of the State's case, and must rely on their similar motions made at the close of all the evidence. G. S. 15-173.

Considering the State's evidence in the light most favorable to the State, and not taking defendants' evidence into consideration unless favorable to the State, or except when not in conflict with the State's evidence, it may be used to explain or make clear the State's evidence (*S.* v. *Nall*, 239 N. C. 60, 79 S. E. 2d 354), as we are required to do in passing upon defendants' motion made at the close of all the

evidence, it tends to show that all the defendants without legal or constitutional right or *bona fide* claim of right entered the luncheonette department of S. H. Kress and Company after having been forbidden by W. K. Boger, the manager and agent of S. H. Kress and Company there, to do so, and after they had been requested by him to leave, refused to do so. The fact, that the violations by all defendants of G. S. 14-126 and G. S. 14-134 were intentional, is shown clearly by their acts, by the two White defendants and by most, if not all, of the Negro defendants in urging people to boycott the Kress store, and further by the plan entered into by the Negro defendants on the night of 5 May 1960 to go the following day to the Kress store, enter the luncheonette department there, take seats, and demand service. The evidence was sufficient to carry the cases to the jury, and we so hold.

The motions to quash the indictments raise most, if not all, of the constitutional questions raised by the motions for judgments of compulsory nonsuit made at the close of all the evidence. All these questions have been considered by the Court and most, if not all, discussed in the opinion. In our opinion, and we so hold, the trial court properly overruled the motions to quash the indictments, and correctly submitted all the cases to the jury.

Defendants' assignments of error relating to the evidence are without merit, and do not justify discussion.

Defendants' assignment of error to the charge of the court to the jury is to the whole charge, without any statement as to what part of it is, as they contend, error. Such an assignment of error is too general and indefinite to present any question for decision. *S.* v. *Dillard,* 223 N. C. 446, 27 S. E. 2d 85, and cases there cited. In that case the Court said: "Unpointed, broadside exceptions will not be considered. Citing authority. The Court will not go on a voyage of discovery to ascertain wherein the judge failed

to explain adequately the law in the case. Citing authority. The assignment must particularize and point out specifically wherein the court failed to change the law arising on the evidence." Further, defendants in their brief make no mention of the charge, and no exception to the charge appears in the record, except in the assignment of error. An assignment of error will be disregarded when it is not supported by an exception in the record, but only by an exception appearing in the assignment of error. *Barnette* v. *Woody*, 242 N. C. 424, 88 S. E. 2d 223; *Watters* v. *Parrish*, 252 N. C. 787, 115 S. E. 2d 1. The assignment of error as to the charge as a whole, not being mentioned, in defendants' brief is taken as abandoned by defendants. Rules of Practice in the Supreme Court, Rule 28, 221 N. C. 544; *S.* v. *Atkins*, 242 N. C. 294, 87 S. E. 2d 507. However, a reading of the charge, which is in the record, shows that the trial judge correctly declared and explained the law arising on the evidence given in the cases, as required by G. S. 1-180, and in particular instructed the jury to the effect that if the defendants entered the luncheonette department of the Kress store after being forbidden under a *bona fide* claim of right and if they had reasonable grounds for such belief, and refused to leave after they had been requested to do so under such claim, as they contend their evidence tended to show, then there would be no criminal responsibility, and it would be the duty of the jury to acquit all defendants. *S.* v. *Clyburn, supra; S.* v. *Fisher*, 109 N. C. 847, 13 S. E. 878. This Court said in *S.* v. *Crawley*, 103 N. C. 353, 9 S. E. 409, which was a criminal action for entry upon land after being forbidden: "A mere *belief* on his part that he had such claim would not be sufficient—he was bound to prove that he had reasonable ground for such belief, and the jury should so find under proper instructions from the court. *S.* v. *Bryson*, 81 N. C. 595." This Court said in *S.* v. *Wells*; 142 N. C.

590, 55 S. E. 210: "True we have held in several well-considered decisions that when the State proves there has been an entry on another's land, after being forbidden, the burden is on the defendant to show that he entered under a license from the owner, or under a *bona fide* claim of right. And on the question of *bona fides* of such claim, the defendant must show that he not only believed he had a right to enter, but that he had reasonable grounds for such belief. *S.* v. *Glenn*, 118 N. C., 1194; *S.* v. *Durham*, 121 N. C., 546. But where there is evidence tending to show that the defendant believed and had reasonable ground to believe in his right to enter, then in addition to his right, the question of his *bona fide* claim of right must be in some proper way considered and passed upon before he can be convicted." Defendants have nothing to complain of in respect to the charge, and their counsel evidently thought so by not mentioning the charge in their joint brief filed with us.

Defendants' motions in arrest of judgment, which the court overruled, and which defendants assign as error, are not mentioned in defendants' brief, and are taken as abandoned by defendants.

All of the assignments of error by the defendants have been considered, and all are overruled. Defendants have not shown the violation of any of their rights, or of the rights of any one of them, as guaranteed by the 14th Amendment to the Federal Constitution, and by Article I, §17, of the North Carolina Constitution.

No Error.

A TRUE COPY:

/s/ ADRIAN J. NEWTON.
Clerk of Supreme Court of North Carolina.

[SEAL]

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

STATE

—v.—

JOHN THOMAS AVENT, LACY CARROLE STREETER, FRANK MCGILL COLEMAN, SHIRLEY MAE BROWN, DONOVAN PHILLIPS, CALLIS NAPOLIS BROWN and JOAN HARRIS NELSON

Appeal docketed	8 November 1960
Case argued	29 November 1960
Opinion filed	20 January 1961
Final judgment entered	20 January 1961

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 6th day of March, 1961.

ADRIAN J. NEWTON
Clerk of the Supreme Court of the State of North Carolina